In the High Court of Judicature at Madras

Dated: 19 - 7 - 2007

Coram:-

The Honourable Mr.Justice F.M.Ibrahim Kalifulla
and
The Honourable Mr.Justice S.Tamilvanan

W.P.Nos.41342 of 2002 & 31101 of 2005

1. N.Balakrishnan
2. S.Asirwatham
3. S.Raman
4. A.Chandrasekaran
5. M.K.Ganesan
6. S.Paramashivan .. Petitioners in W.P.No.41342 of 2002

vs.

1. Chief Engineer,
   Highways and Rural Works Department,
   P.W.D. Buildings,
   Chepauk, Chennai-600 005.

2. Government of Tamilnadu,
   Rep. by its Secretary to Government,
   Highways Department,
   Fort St.George, Chennai-600 009.

3. Association of Tamilnadu Highways Engineers,
   rep. by its General Secretary N.Subramaniam,
   having Office at Taluk Office Road,
   Saidapet, Chennai-600 015... Respondents in W.P.No.41342 of 2002

1. S.Panneerselvam
2. T.G.Rajasekaran
3. K.Thangathurai
4. S.Sankaranarayanan
5. A.Samuel Ebinezer Jebarajan
6. P.Natarajan
7. S.Giri
8. E.L.Sathyamoorthi
9. Leslie Joseph Suresh Kumar
10. N.Periyaraj
11. G.Sivakumar
12. G.Thangamuthu

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

13. K.C.Parameswaran
14. V.S.Thangavel
15. T.Chandraseakarn
16. M.Chakravarthy Vijayakumar
17. G.M.Mani
18. A.Sugumaran
19. G.Rani .. Petitioners in W.P.No.31101 of 2005

vs.

1. The Government of Tamilnadu,
   represented by its Secretary,
   Highways Department,
   Fort St.George, Chennai-9.

2. The Chief Engineer (General),
   Highways Department,
   P.W.D. Building,
   Chepauk, Chennai-5.

3. A.Chandrasekaran
4. S.Asirvatham
5. N.Krishnan Achari
6. Association of Tamil Nadu Highways Engineers,
   rep. by its General Secretary,
   35, Taluk Office Road,
   Saidapet, Chennai-600 015. .. Respondents in W.P.No.31101 of 2005

Writ Petition No.41342 of 2002 filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorarified Mandamus, to call for the records of the common order dated 11.7.2002 passed by the Tamil Nadu Administrative Tribunal in O.A.Nos.9547, 9548, 9549, 9824, 9826 and 9828 of 1997 and the respondents culminated in the Letter Lr.(Ms.)No.614/KH1/95, dated 27.7.1995 of the Secretary to Government, Public Works Department, Government of Tamilnadu, quash the same and direct the respondents to accord all service benefits to the petitioners as provided under Tamil Nadu Highways Engineering State Service Rules which govern their service conditions.

Writ Petition No.31101 of 2005 filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorarified Mandamus, to call for the records pertaining to issue of the seniority list of Assistant Divisional Engineers of Highways Department as on 1.4.2004 published by the second respondent in Special Memo No.Nirvagam 1 (3)/197876/2004-1, dated 29.4.2004 culminating into the panel of Assistant Divisional Engineers approved in G.O.Ms.No.169, Highways Department, dated 19.8.2005 and to quash he same and to direct the first and second respondents to prepare the revised seniority list of Assistant Divisional Engineers afresh as per the order dated 11.7.2002 passed by the Tamil Nadu Administrative Tribunal in O.A.No.9546 of 1997 and other batch cases.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

For petitioners in
W.P.No.41342 of 2002
and respondents 3 to 5
in W.P.No.31101 of 2005 :Mr.R.Muthukumarasamy,
Senior Counsel for
Mr.V.Sankaranarayanan

For petitioners in
W.P.No.31101 of 2005 : Mr.R.Selvakumar

For respondent-3 in
W.P.No.41342 of 2002: Mr.N.Subramanian for
Mr.Muthukannu

For respondents 1 & 2
in both W.Ps. : Mr.S.Ramasamy,
Addl. Advocate General

For respondent-6 in
W.P.No.31101 of 2005: Mr.Yashod Vardhan, Senior Counsel

ORDER

F.M.IBRAHIM KALIFULLA,J

Six of the applicants before the Tamil Nadu Administrative Tribunal in O.A.Nos.9546 of 1997, etc. batch are the petitioners in W.P.No.41342 of 2002. The challenge in that Writ Petition is to the common order of the Tribunal dated 11.7.2002 passed in the said batch of Original Applications. Some of the aggrieved persons in respect of the seniority list drawn by the State Government in its Special Memo No.Nirvagam 1(3)/ 197876/2004-1, dated 29.4.2004, culminating in the panel of Assistant Divisional Engineers, as approved in G.O.Ms.No.169, Highways Department, dated 19.8.2005, are the petitioners in W.P.No.31101 of 2005.

2. The fate of W.P.No.31101 of 2005 virtually depends upon the decision to be taken in W.P.No.41342 of 2002. Therefore, W.P.No.41342 of 2002 is considered in the first instance before going into the merits of the claim made in W.P.No.31101 of 2005.

3. For the sake of convenience, the petitioners in W.P.No.41342 of 2002 shall hereinafter be called as the applicants and the petitioners in W.P.No.31101 of 2005 shall hereinafter be referred to as they are arrayed therein and the other respondents are referred to as they are arrayed in W.P.No.41342 of 2002. The issue in both the Writ Petitions relate to the seniority of the applicants vis-a-vis the petitioners in W.P.No.31101 of 2005. The applicants were all employed in the Tamil Nadu Highways Engineering Service. 15 persons filed the Original Applications commencing from O.A.No.9546 of 1997, etc. batch, challenging the determination of their seniority as per the proceedings of the Secretary to Government,

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Public Works Department, Chennai-9, dated 27.7.1995. To understand the controversy involved in both the Writ petitions, the background as to how the services of certain categories of employees in the Tamil Nadu Highways Engineering Service came to be treated right from the year 1972, is required to be briefly stated.

4. By G.O.Ms.No.1745, Public Works Department, dated 10.10.1972, the Special Rules for the Tamil Nadu Engineering Subordinate Service came to be amended to provide for appointment of Overseers, Head Draftsman or Civil Draftsman possessing Diploma in Engineering and A.M.I.E. qualifications with a minimum service of three years as Junior Engineers (now Assistant Engineers). The said Special Rules applicable to the Tamil nadu Engineering Subordinate Service in the Public Works Department was adopted by the Highways Department for the Tamil Nadu Highways Engineering Service. By virtue of the said Rule position, Draftsman who were in three different categories, namely Grade-I, II and III on acquiring A.M.I.E. qualification, were eligible to be promoted as Junior Engineers (now Assistant Engineers). Such position prevailed till 2nd August, 1980. The applicants were all working as Draftsman Grade-II and III who had acquired the requisite qualification between 1972 and 1980 and thereby, were fully eligible for being promoted as Junior Engineers (now Assistant Engineers). On 2.8.1980, by G.O.Ms.No.1356, Public Works Department, the position was altered, by which while directing the regularisation of such of those Draftsman who have acquired Degree qualification in Engineering and who have so far been appointed as Junior Engineers (now Assistant Engineers) temporarily, be regularised in that post. It was further ruled that henceforth, the Draftsman Grade-I alone who have put in three years of service, would be eligible for appointment as Assistant Engineers on acquiring A.M.I.E. and B.E. Degree qualifications. On and from that date, namely 2.8.1980, the Draftsman Grade-II and III and the Overseers were not eligible for such appointment and they have to take their chance along with the fresh candidates for direct recruitment to the post of Assistant Engineers in the Tamil Nadu Engineering Service.

5. By virtue of the issuance of the above said Government Orders, the position was that the applicants and such of those Draftsman in Grade-II and III who had acquired necessary qualifications, namely B.E/A.M.I.E. and who were appointed temporarily as Junior Engineers (now Assistant Engineers), their services were regularised retrospectively from 10.10.1972. In effect, the applicants who were temporarily appointed as Junior Engineers on acquisition of the required qualifications, namely B.E/A.M.I.E. on the respective dates of such temporary appointments in between 10.10.1972 and 2.8.1980, as such came to be regularised in the post of Junior Engineer (now Assistant Engineer).

6. By a subsequent Government Order in G.O.Ms.No.574, Transport Department, dated 4.5.1982, the benefits as provided in G.O.Ms.No.1356, Public Works Department, dated 2.8.1980, were "mutatis mutandis" extended to the persons working in the Tamil Nadu Highways and Rural Works

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Department also retrospectively from 10.10.1972. By yet another G.O. in G.O.Ms.No.478, Transport Department, dated 23.5.1988, the amendment to the Special Rules for the Tamil Nadu Highways Engineering Subordinate Service came to be made with effect from 10.10.1972 in exercise of the powers conferred on the Governor of Tamil Nadu by the proviso to Article 309 of the Constitution of India. By virtue of the said amendment which was brought into force with effect from 10.10.1972, the purport intended in G.O.Ms.No.1356, P.W.D., dated 2.8.1980 and G.O.Ms.No.574, Transport Department, dated 4.5.1982, was brought into the statutory Rules.

7. The services of the applicants came to be regularised in the post of Assistant Engineers after the issuance of G.O.Ms.No.478, Transport Department, dated 23.5.1988. Thereafter, it is stated that the seniority list was drawn in the year 1993 based on the above referred to Government Orders. One other factor was that the petitioners in W.P.No.31101 of 2005 were all candidates who got selected and appointed by way of direct recruitment to the post of Assistant Engineers. Though prior to such direct recruitment, they were working based on their appointment under Rule 10(a)(i) of the Tamil Nadu State and Subordinate Service Rules, their seniority was stated to have been determined based on their direct recruitment, which came to be made in the year 1982.

8. In the above stated circumstances, the Secretary to Government, Public Works Department, came forward with a letter dated 27.7.1995, which was impugned before the Tribunal by the applicants. By the said communication dated 27.7.1995, it was directed that the seniority of the applicants whose services were regularised with retrospective effect under G.O.Ms.No.478, Transport Department, dated 23.5.1988, should be fixed below the last candidate selected by the TNPSC prior to 23.5.1988, which virtually referred to the petitioners in W.P.No.31101 of 2005. It was also directed therein that the anomalies in the fixation of seniority of Assistant Engineers as on 1.1.1993 be rectified. By the order impugned in these Writ Petitions, the Tribunal held that such a direction issued by the Secretary to Government, P.W.D. in the impugned communication dated 27.7.1995, was valid.

9. Assailing the said impugned order of the Tribunal, Mr.R.Muthukumarasamy, learned Senior Counsel appearing for the applicants (i.e. the petitioners in W.P.No.41342 of 2002) contended that the seniority of a member of a service should be regulated only by the Rules and cannot be done by Executive instructions. The learned Senior Counsel also contended that the applicants were all in service right from their respective date of their temporary promotion to the post of Junior Engineers (now Assistant Engineers) between 1972 and 1980, that when once such a service was regularised by G.O.Ms.No.574, Transport Department, dated 4.5.1982 retrospectively from the respective dates of their appointment and when such appointment in the promoted post was also governed by the amended Rules in the Tamil Nadu Highways Engineering Subordinate Service in G.O.Ms.No.478, Transport Department, dated

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

23.5.1988, it will have to be held that their entry into service in the post of Assistant Engineers was earlier to the appointment of the petitioners in W.P.No.31101 of 2005, who came to be appointed in the regular service by way of direct recruitment only after 1982, and therefore, their seniority was rightly determined in the year 1993 over and above the petitioners in W.P.No.31101 of 2005, which ought not to have been interfered with as directed by the Secretary to Government, P.W.D., in the impugned communication dated 27.7.1995. The learned Senior Counsel also contended that the consequential amendment to the Rules relating to the Tamil Nadu Highways Engineering Subordinate Service when continued to remain in force, the first and second respondents were bound to follow the said Rules without any deviation.

10. As against the above submissions, Mr.R.Selvakumar, learned counsel appearing for the petitioners in W.P.No.31101 of 2005 and Mr.Yashod Vardhan, learned Senior Counsel appearing for the sixth respondent-Association of Tamil Nadu Highways Engineers in W.P.No.31101 of 2005, contended that without proving their respective date of appointments, the applicants (the petitioners in W.P.No.41342 of 2002) cannot claim their seniority overlooking the rightful claim of the petitioners in W.P.No.31101 of 2005. Mr.Selvakumar, learned counsel relied upon 1985 (Supp) SCC 38 (Bhagwan Das vs. I.C.A.R) in support of his submissions. He further contended that even the retrospective operation of the Rules will not affect the persons who were already in service, as held by the Supreme Court in the decision reported in 1994 Supp (1) SCC 44 (K.Narayanan vs. State of Karnataka). It was then contended by both the learned counsel that the applicants cannot be held to have been appointed in accordance with the Rules prior to 23.5.1988 and unless their appointments were in accordance with the Rules, which is a condition precedent for determination of their seniority, they are not entitled to claim seniority over and above the petitioners in W.P.No.31101 of 2005. Reliance was also placed upon the decision reported in 1995 Supp (1) SCC 572 (V.Sreenivasa Reddy vs. Govt. of A.P) in support of the above said contentions. Our attention was also drawn to Rule 2(1) and Rule 35(aa) of the Tamil Nadu State and Subordinate Service Rules. Mr.Yashod Vardhan, learned Senior Counsel also placed reliance upon the decision of the Supreme Court reported in 2006 (6) SCC 558 (K.Madalaimuthu vs. State of T.N) to contend that the appointment made under Rule 10(a)(i) of the Tamil Nadu State and Subordinate Service Rules, cannot be the basis for determining the seniority.

WEB COPY

11. Having heard the learned counsel for the respective parties, one other Government Order which is required to be mentioned is G.O.Ms.No.807, Public Works (HK) Department, dated 24.5.1993, by which the relevant amendment in pursuance of the earlier G.Os. including G.O.Ms.No.574, Transport Department, dated 4.5.1982 and G.O.Ms.No.478, Transport Department, dated 23.5.1988, came to be notified. It was notified with specific reference to the dates from which the amendment to the relevant Rules was brought into effect. It specifically provided that the amendment

https://hcservices.ecourts.gov.in/hcservices/

which was brought into the Rule providing for the regularisation of Draftsman Grade-I, II and III will take effect from 10.10.1972. The amended Rule 5 of the Special Rules for the Tamil Nadu Highways Engineering Service, relating to the category of Junior Engineers, which post was to be filled by way of direct recruitment or recruitment by transfer, specifically recognises the entitlement of Draftsman Grade-I to III in Category 4 (a) or 4 (b) of the Tamil Nadu Highways Engineering Subordinate Service as one of the source by which the post of Junior Engineer can be filled up by way of recruitment by transfer. However, in the amended Rule 5(d) after the third proviso, a further proviso was added which made clear that after 2.8.1980, they were not eligible to be considered and that they can only aspire to become Assistant Engineers along with the fresh candidates appointed by direct recruitment. The amended Rule 23 by way of "saving" clause reinforces the position that nothing contained in those Rules shall adversely affect the appointments made from the category of Draftsman Grade I to III to the category of Junior Engineers from 10.10.1972 onwards till the date of issuance of those amendments.

12. A conjoint reading of G.O.Ms.No.1356, Public Works Department, dated 2.8.1980, G.O.Ms.No.574, Transport Department, dated 4.5.1982, G.O.Ms.No.478, Transport Department, dated 23.5.1988 and G.O.Ms.No.807, Public Works (HK) Department, dated 24.5.1993, boils down to the position that the Draftsman Grade-I to III having acquired the qualifications of B.E/A.M.I.E. between 10.10.1972 and 2.8.1980, became eligible for being promoted as Junior Engineers (now Assistant Engineers), that such of those Draftsman in these Grades who were temporarily promoted between 10.10.1972 and 2.8.1980, were regularised from their respective date of such temporary appointments and that such regularisation was protected by the relevant amended Rules, which was brought into the Rule books, though subsequently by giving retrospective effect as from 10.10.1972.

13. To buttress the argument of the petitioners in W.P.No.31101 of 2005 as well as the third respondent-Association of Engineers therein, insofar as it related to the retrospectivity of the operation of the Rules and its validity, at the outset, it will have to be stated that so far, neither the petitioners in W.P.No.31101 of 2005 nor the third respondent therein, have made any challenge to any of the above referred to G.Os. or the amended Rules in the manner known to law. It will have to be kept in mind that the applicants were not appointees in the post of Junior Engineer (now Assistant Engineer), directly by way of temporary appointment under Rule 10(a)(i) of the Tamil Nadu State and Subordinate Service Rules. They were all already in service as Draftsman in Grade-II and III. It is also not in dispute that they were all temporarily promoted to the post of Junior Engineers (now Assistant Engineers) between 1972 and 1980 from the existing category of Draftsman-II and III, whereas the petitioners in W.P.No.31101 of 2005 were all stated to have been appointed in the post of Junior Engineers (now Assistant Engineers) under Rule 10(a)(i) of the Tamil Nadu State and Subordinate Service Rules for the first

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

time and who were all appointed directly through the TNPSC only in the year 1982. Therefore, when the Rules specifically deal with the case of the applicants providing for their regularisation from the respective dates of their temporary promotions in the post of Junior Engineers (now Assistant Engineers) as early as on 4.5.1982 and when such regularisation was confirmed by G.O.Ms.No.478, Transport Department, dated 23.5.1988 and G.O.Ms.No.807, Public Works (HK) Department, dated 24.5.1993, it will have to be held that such regularisation based on the conscious decision made by the State Government should also be validated by bringing forth necessary amendment to the Rules, which will certainly stand on a higher footing over the claims of the petitioners in W.P.No.31101 of 2005, who had entered into the service on a regular basis only as from the year 1982, i.e. long after the regularisation of the services of the applicants in the post of Junior Engineers (now Assistant Engineers).

14. In the light of the said factual position as regards the service of the applicants (the petitioners in W.P.No.41342 of 2002) vis-a-vis the petitioners in W.P.No.31101 of 2005, when the various decisions relied upon by the counsel for the petitioners in W.P.No.31101 of 2005 are examined, as far as the reliance placed upon 1985 (Supp) SCC 38 (cited supra) is concerned, in the said decision, the Supreme Court held that in the absence of satisfactory proof of the date of appointment of the petitioners; in that case in the Grade as Assistants; they cannot successfully urge as to the violation of Articles 14/16 of the Constitution of India. The said ratio as regards the proof of appointment cannot be applied to the facts of this case, where the applicants were already in service as Draftsman Grade-II and III.

15. A reference to G.O.Ms.No.574, Transport Department, dated 4.5.1982 (paragraph 6 of that G.O) makes it clear that the applicants were all persons whose services came to be regularised between 1972 and 1980 from the respective dates when they were temporarily appointed as Assistant Engineers. Such appointment of the applicants was never challenged by anyone much less by the petitioners in W.P.No.31101 of 2005. It is not the case of the petitioners in W.P.No.31101 of 2005 that there was no such temporary appointment of those applicants in the post of Assistant Engineers. In fact, the third respondent-Association of Tamil Nadu Highways Engineers who represented the petitioners in W.P.No.31101 of 2005, did not raise any such contention as could be seen from the impugned order of the Tribunal, where there is no such contention raised. Therefore, in our considered opinion, it is not now open for the petitioners in W.P.No.31101 of 2005 for the first time to question or dispute the factum of temporary appointment of the applicants in the post of Assistant Engineers between 1972 and 1980.

16. Reliance was also placed upon the decision of the Supreme Court reported in 1994 Supp (1) SCC 44 (cited supra) for the proposition that the retrospective operation of a Rule in violation of any Constitutional right, cannot be made. We are unable to apply the said decision to the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

facts of this case. In the said judgment of the Supreme Court, when we read the facts, we have found in paragraph 3 that the Supreme Court has illustrated how the retrospectivity operation of a Rule causes hardship to the other group, which reads as under:

> "3. .....
>
> ..... Yet when seniority list was published in 1988 the Junior Engineers appointed by transfer in 1988 were given their seniority by giving benefit both under Notes (2) and (3). How did it work, can be explained by taking illustration of a Junior Engineer transferred in 1988. He has been placed at serial No.801 in the list. He acquired the degree qualification in July 1976. Since on notional working out the vacancy was found to exist in December 1976 his seniority was pushed to 1976 the rule having come in force on that day and he being qualified was deemed to have been appointed as an Assistant Engineer and thereafter he was given weightage of four years being one-third of the service he had rendered as Junior Engineer. He thus came to be placed as Assistant Engineer from December 1972. Consequently a second claim petition was filed before the Tribunal. It was dismissed as the Tribunal did not find any illegality in placement of the diploma holder as the weightage of four years was given only from the date the rule is deemed to have come into force namely 1976."

As compared to the case on hand, first and foremost, while giving effect to G.O.Ms.No.1356, Public Works Department, dated 2.8.1980, G.O.Ms.No.574, Transport Department, dated 4.5.1982, G.O.Ms.No.478, Transport Department, dated 23.5.1988 and G.O.Ms.No.807, Public Works (HK) Department, dated 24.5.1993, none of the provisions contained either in these G.Os. or in the amended Rules, provided for grant of any benefit of any notional promotion or deemed appointment. On the other hand, even if the Draftsman Grade-II and III had acquired the qualifications of B.E/A.M.I.E. on a particular date, their status as Junior Engineers was ascertained from the actual date when they were temporarily appointed as Junior Engineers (now Assistant Engineers). That apart, unlike the facts involved in the said decision of the Supreme Court, the Rule did not provide for any weightage to the detriment of the petitioners in W.P.No.31101 of 2005 in favour of the applicants for the past services rendered as Draftsman Grade-II and III. In fact, in the light of the facts in that case, the Supreme Court has not held that retrospective operation of a Rule can never be made. On the other hand, in the ruling of the Supreme Court, the ratio is while the Rules operate prospectively, the retrospectivity is an exception. In paragraph 7 of the said decision (1994 Supp (1) SCC 44), the Supreme Court has stated as under as to the retrospectivity of the Rule:

> "7. .... Rules operate prospectively.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

> Retrospectivity is an exception. Even where the statute permits framing of rule with retrospective effect the exercise of power must not operate discriminately or in violation of any constitutional right so as to affect vested right. The rule-making authority should not be permitted normally to act in the past. The impugned rule made in 1985 permitting appointment by transfer and making it operative from 1976 subject to availability of vacancy in effect results in appointing a Junior Engineer in 1986 with effect from 1976. Retrospectivity of the rules is a camouflage for appointment of Junior Engineers from a back date. In our opinion the rule operates viciously against all those Assistant Engineers who were appointed between 1976 to 1985. ....
>
> ....
>
> As seen earlier there is no nexus between framing a rule permitting appointment by transfer and making it retrospective with effect from 1976. Appointing a person to a higher post in a different cadre in which he has never worked is violative of constitutional guarantee of those who are working in the cadre. It is against basic principle of recruitment to any service. ..... "

In the case of hand, it is not as if the applicants' service in the cadre of Draftsman Grade-II and II was deemed to have been rendered in the cadre of Junior Engineer (now Assistant Engineer) in order to state that the retrospective operation of the Rule in the case of hand had no nexus to the appointment of the applicants to the post of Junior Engineers. On the other hand, taking into account the fact that the applicants who were in the services of the State in the cadre of Draftsman Grade-II and III and who got temporarily promoted to the post of Junior Engineers on acquiring the required qualifications, were functioning as such in the service and the regularisation of their appointments in that post was a justifiable one, and therefore, the Rule providing for such regularisation from the respective date of their functioning in that post, cannot be held to be without any nexus to the appointment so made. In our opinion, in the case on hand, it will fall under the exception category where the retrospective operation of a Rule was inevitable to the applicants and therefore, the Rule providing for such retrospective operation can never be held to be unjustified. Therefore, reliance placed upon the said decision on behalf of the petitioners in W.P.No.31101 of 2005 cannot be accepted.

17. Reliance was also placed upon the decision of the Supreme Court reported in 1995 Supp (1) SCC 572 (cited supra). In paragraph 15, the Supreme Court has stated that the appointment in accordance with the Rules is a condition precedent to count the seniority and that temporary or ad-hoc or fortuitous appointments etc., are not appointments in accordance

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

with the Rules and the temporary service cannot be counted towards the seniority. While relying upon the said decision, a reference was made to Rule 2(1) of the Tamil Nadu State and Subordinate Service Rules, which states that a person is said to be "appointed to a service" when in accordance with these Rules or in accordance with the Rules applicable at the time, as the case may be, he discharges, for the first time the duties of a post borne on the cadre of such service or commences the probation, instruction or training prescribed for members thereof. In the Explanation to the said Rule 2(1), it is stated that the appointment of a person holding a post borne on the cadre of one service to hold additional charge of a higher post in the same service or a post borne on the cadre of another service or to discharge the current duties thereof, does not amount to appointment to the latter service.

18. Under Rule 35(aa) of the Tamil Nadu State and Subordinate Service Rules, for determining the seniority of a person in service, it is stipulated that it should be determined with reference to the date on which he is appointed to the services, class, category or grade.

19. Even a combined reading of Rule 2(1) along with Rule 35(aa) of the Tamil Nadu State and Subordinate Service Rules, does not prohibit creation of weightage by way of an amendment to provide for regularisation of a service of a person who was already appointed to a cadre and who came to be temporarily promoted to a higher post. It is not the case of the petitioners in W.P.No.31101 of 2005 that the applicants (the petitioners in W.P.No.41342 of 2002) were all continuing in the post of Draftsman Grade-II and II and were all temporarily attending the duties of a higher post, namely Junior Engineer (now Assistant Engineer) in order to state that they were not appointed to the post of Junior Engineers. When once the temporary appointment to the post of Junior Engineer came to be made on acquiring the requisite qualifications, the right of the applicants in that post got crystallised by virtue of G.Os. issued in G.O.Ms.No.1356, Public Works Department, dated 2.8.1980, G.O.Ms.No.574, Transport Department, dated 4.5.1982, G.O.Ms.No.478, Transport Department, dated 23.5.1988 and G.O.Ms.No.807, Public Works (HK) Department, dated 24.5.1993. Therefore, the counting of their service was from the date when they were functioning as Junior Engineers, which functioning was temporary at the inception, which got regularised in the year 1982 itself, i.e. on 4.5.1982 and got further reinforced by G.O.Ms.No.478, Transport Department, dated 23.5.1988 and G.O.Ms.No.807, Public Works (HK) Department, dated 24.5.1993. Inasmuch as the appointment of the applicants (the petitioners in W.P.No.41342 of 2002) was in accordance with the Rules, the ratio of the Supreme Court (in 1995 Supp (1) SCC 572) that in such cases, it is a pre-condition for counting the seniority, is fully satisfied. For the very same reasoning, it will have to be held that the temporary appointment of the applicants once regularised loses its temporary phenomenon and thereby, their right as regular Junior Engineers stood established by virtue of the issuance of the several Government Orders referred to above and as per the amended Rules. The said decision

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

therefore does not help the case of the petitioners in W.P.No.31101 of 2005.

20. As far as the decision reported in 2006 (6) SCC 558 (cited supra) is concerned, the Supreme Court dealt with a case of a Rule 10(a)(i) appointees under Tamil Nadu State and Subordinate Service Rules, whose services came to be subsequently regularised retrospectively, based on which the seniority came to be determined as against the subsequent regular appointees. In the said decision, it was an admitted position that the contesting respondents therein were admittedly appointed under Rule 10 (a)(i) of the Rules. It is in the above stated circumstances, it was held that the said appointment cannot be held to be the one covered by Rule 2 (1) of the Rules and consequently, their regularisation from the date of their initial appointment under Rule 10(a)(i) for the purpose of counting the seniority was not in accordance with the Rules. In the light of the facts involved in the case on hand, we find that the case on hand is distinguishable and therefore, the said decision cannot also be applied to the facts of this case. Moreover, when we read the judgment of the Supreme Court reported in 1994 Supp (1) SCC 44 (cited supra) and the one reported in 2006 (6) SCC 558 (cited supra) together, we find that a statutory Rule providing for retrospective regularisation is not prohibited always and that in exceptional circumstances, it is permissible. The Rule making authority should ensure that exercise of such power does not result in discriminatory treatment or in violation of any Constitutional right. Therefore, when the creation of a Rule by way of Amendment takes note of such safeguards and was intended to confer certain benefits for some deserving categories, no fault can be found with such actions. Moreover, the amended Rule providing for retrospective regularisation to the applicants did not create any fictitious right but was only intended to legitimise the status of the applicants as temporary Assistant Engineers from the factual date of their functioning, which can never be held as fictitious or not a real one.

21. For all the above stated reasons, we find that the Tribunal's order impugned in W.P.No.41342 of 2002 cannot be sustained. Unfortunately, the Tribunal has not examined the application of the various Government Orders and the ultimate amendment to the Rules which created a legally enforceable right and an entitlement for the petitioners in W.P.No.41342 of 2002 to claim precedence over the petitioners in W.P.No.31101 of 2005 in the matter of seniority. We therefore set aside the impugned order of the Tribunal in the batch of Original Applications as well as the impugned communication dated 27.7.1995 before the Tribunal in the batch of the Original Applications, namely in Letter No.614/HK1/95, Public Works Department, dated 27.7.1995 and direct the first and second respondents in W.P.No.41342 of 2002 to determine the seniority of the petitioners in W.P.No.41342 of 2002 accordingly.

22. In view of our order passed in W.P.No.41342 of 2002, we do not find any scope to interfere with the proceedings challenged in

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

W.P.No.31101 of 2005, dated 29.4.2004, culminating in the panel of Assistant Divisional Engineers approved in G.O.Ms.No.169, Highways Department, dated 19.8.2005. Accordingly, W.P.No.41342 of 2002 stands allowed and W.P.No.31101 of 2005 stands dismissed with the above observations. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

cs

Copy to
1. Chief Engineer,
Highways and Rural Works Department,
P.W.D. Buildings,
Chepauk, Chennai-600 005.

2. The Secretary to Government,
Government of Tamilnadu,
Highways Department,
Fort St.George, Chennai-600 009.

+ 2 CCs To Mr. Sivam Sivandaraj, Advocate SR NO.43906

+ 1 CC to the Government Pleader SR NO 44882

W.P.Nos.41342 of 2002
and 31101 of 2005

nsm[co]
gp/26.7.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/